

## Exhibit \_\_\_\_\_ Office of Professional Responsibility Guide to Sanctions

### INTRODUCTION

This Guide to Sanctions is included as an Exhibit to Internal Revenue Manual \_\_\_\_\_. The Guide represents violations of 31 C.F.R. Part 10, revised as of September 26, 2007, (Circular 230), and a range of suggested reasonable sanctions. It is not intended to be an exhaustive listing of all offenses. The facts and circumstances of each case must be considered. Progressive suspension terms, up to and including disbarment, are based on individual mitigating and/or aggravating factors. The sanctions are graduated based upon these factors as set forth below, the number of violations, and current fitness to practice.

### SANCTION AUTHORITY

Under 31 U.S.C. § 330, the Secretary of the Treasury may . . .

regulate the practice of representatives of persons before the Department of the Treasury; and . . .

after notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who--

- (1) is incompetent;
- (2) is disreputable;
- (3) violates regulations prescribed under this section; or
- (4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

The sanction authority is designed to correct misconduct. The proposed remedial sanction in each case must be fair, equitable, impartial, and should not be to punish but to correct and motivate the individual to adhere to his duties under Circular 230.

### CHOOSING AN APPROPRIATE SANCTION UNDER THESE GUIDELINES

In considering whether corrective sanction is warranted, OPR will review and analyze all the evidence of record.

Choosing a corrective sanction that is reasonable and appropriate for the circumstances involved is extremely important. All relevant factors must be given careful consideration. This document serves as a guide for determining the proper corrective sanction, and is not intended to establish a rigid standard or to

imply that a greater or lesser corrective sanction is inappropriate.

A corrective sanction that is below the range indicated could be appropriate where there are compelling mitigating factors.

A corrective sanction that is above the range indicated could be appropriate for particularly egregious misconduct or for cases where there are significant aggravating factors. Even for offenses where disbarment is not listed, disbarment for a first offense is not precluded.

This guide may be deviated from depending on the individual circumstances that may be involved. Each case will be considered individually and dealt with on its merits. Deviations from the guideline will be documented in the file. Mitigating factors, set forth below, must be considered when proposing and deciding disciplinary and adverse sanctions. Multiple offenses, offenses which violate more than one section of Circular 230 and repeated offenses normally will be grounds for a more severe sanction than is warranted for a single offense.

In general, a reprimand or censure is appropriate where that sanction is all that is necessary to correct the behavior. Where the determination of suspension is 6 months or less, reprimand or censure may be appropriate. Suspensions up to 24 months, are appropriate where a suspension is necessary to bring home to the practitioner the severity of his or her violation of Circular 230. Suspensions in excess of 24 months are appropriate where the misconduct indicates that the practitioner may be perpetrating an on-going harm to the taxpaying community or where the misconduct, for instance, multiple instances of violations, indicates a current lack of fitness to practice that would not be rectified by a shorter suspension. The suggested suspensions are for each individual violation. Disbarment will be sought for any violation where the determination of suspension is at least 5 years.

These Guidelines are effective for settlements occurring after OPR has finalized its investigation.

#### MITIGATING AND AGGRAVATING FACTORS FOR DETERMINING THE APPROPRIATE SANCTION

- Not all of the following factors apply in every case and not all factors will be given equal weight. Before deciding upon a corrective sanction, OPR will consider the relevant factors, given the circumstances of each individual case, and strike an appropriate balance. The list of factors is neither meant to be exhaustive nor intended to be applied mechanically, and will be viewed in the context of the nature and severity of the violation at issue.

## Mitigating Factors

1. For tax non-compliance cases, correction of the violation before contact with the IRS.
2. For tax non-compliance cases, correction of the violation before contact with OPR.
3. For tax non-compliance cases, correction initiated within a reasonably short period after contact by OPR.
4. Illness, incapacitation, or personal hardships directly correlating to the action or inaction violating Circular 230.
5. Illness, incapacitation or personal hardships of the family or others close to the practitioner directly correlating to the action or inaction violating Circular 230.
6. Personal or professional financial distress correlating to non-payment of taxes, but not non-payment of form 941 employment tax obligations.
7. Extrinsic circumstances such as natural disasters directly correlating to the action or inaction violating Circular 230
8. Recognition of action or inaction violating Circular 230 and commitment to future compliance.
9. For firms, commitment to establishing internal controls to prevent recurrences of the violation.
10. Preventative measures in effect prior to the misconduct/and or measures put into place after the misconduct to prevent future violations.
11. Age of allegations.

## Aggravating Factors

1. Failure to respond to OPR contact.
2. For tax non-compliance cases, failure to correct the issue after contact from the IRS.
3. For tax non-compliance cases, failure to correct after contact by OPR.
4. For tax non-compliance cases, multiple tax issues related to non-compliance on multiple types of forms in the same tax period, including penalties.
5. For tax non-compliance cases, sum of money at issue.
6. Motive, especially those indicating personal gain.
7. Pattern of action or inaction violating Circular 230.
8. Assertion of legal arguments previously ruled frivolous by courts of law.
9. Confrontational behavior outside the bounds of zealous defense.
10. Previous incidents of violation of Circular 230.
11. The number of offenses (See Note).
12. Failure to understand or recognize that actions constituted a violation of Circular 230.
13. Negative effect on tax administration.

OFFENSE	CIRCULAR 230 OFFENSE	RANGE OF SUSPENSION
If a form 1040 is late filed at time of OPR contact	Section 10.51(a)(6)	Then 2 to 4 months for each form 1040. If a form 1040 has or had a balance past due and/or penalties then 4 months for each form late filed 1040 with a past due balance, but no increase where financial hardship has affected the ability to pay.
If a form 1040 is non-filed at time of OPR contact	Section 10.51(a)(6)	Then 4 to 6 months for each non-filed form 1040. If a form 1040 has or had a balance past due and/or penalties then 6 months for each non-filed form 1040 with a balance, but no increase where financial hardship has affected ability to pay.
If a form 941 is filed late at time of contact	Section 10.51(a)(6)	Then 2 months to 4 months for each form 941 late filed. If a late filed form 941 has or had a balance past due and/or penalties then 4 months for each form 941 late filed, BUT NO consideration is made of financial hardship or ability to pay.
If a form 941 is non-filed at time of OPR contact	Section 10.51(a)(6)	Then 4 to 6 months for each form 941 non-filed. If a non-filed form 941 has or had a balance past due and/or penalties then 6 months for each form 941 non-filed, BUT

		No consideration is made of financial hardship or ability to pay.
If a form 940 is late-filed at time of OPR contact	Section 10.51(a)(6)	Then 1 month to 2 months for each form 940 late-filed. If a form 940 has or had a balance due then 2 months for each late-filed form 940, but no increase where financial hardship has affected ability to pay.
If a form 940 is non-filed at time of OPR contact	Section 10.51(a)(6)	Then 2 months to 4 months for each form 940 non-filed. If a form 940 has or had a balance due then 4 months for each late-filed form 940, but no increase where financial hardship has affected the ability to pay.

Note: For late filed or non-filed form 1040's or form 940's, if 4 or more years are involved, multiply the base determination for those late filed or non-filed 1040's or 940's by 2. It is within the discretion of the enforcement attorney to not apply the multiplier where there is mitigation directly correlating to charged years.

For late filed or non-filed form 941's, if 8 or more quarters are involved, multiply the base determination for those late filed or non-filed 941's by 2. It is within the discretion of the enforcement attorney to not apply the multiplier where there is mitigation for each of the charged years.

Examples:

1. H, a CPA, has a practice which consists solely of preparing tax returns for individuals and businesses. H has never filed a power of attorney, or written declaration of representation, with the Service. H filed her personal 2004 and 2005 Forms 1040 one year past the filing deadlines for each and requested no extensions. Although section 10.2(a)(5) of Circular 230 defines a "*practitioner*" as any individual described in section 10.3(a)-(e) (essentially, attorneys and CPAs under specific practice circumstances,

Enrolled Agents, Enrolled Actuaries, and Enrolled Retirement Plan Agents), Circular 230 section 10.7(e) provides that “[a]ny individual may prepare a tax return, appear as a witness for the taxpayer before the Internal Revenue Service, or furnish information at the request of the Internal Revenue Service or any of its officers or employees.” The performance of these activities, therefore, by themselves does not make an individual a practitioner subject to Circular 230.

Circular 230 sections 10.3(a) and (b) entitled *Who may practice*, clarify the circumstances under which a duly licensed attorney or CPA is considered to be a “practitioner” subject to Circular 230. Section 10.3(b) states in relevant part: “Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the [IRS] by filing with the [IRS] a written declaration that the certified public accountant is currently qualified as a certified public accountant and is authorized to represent the party or parties.” Sections 10.3(a) and (b) go on to say that attorneys and CPAs are not required to file written declarations before rendering written advice that is covered by sections 10.35 and 10.37; but that such advice nevertheless constitutes “practice” before the IRS.

As a consequence of the interplay of these various sections of Circular 230, an attorney or CPA whose practice consists solely of tax return preparation is not a practitioner subject to Circular 230. However, if attorneys or CPAs perform other services which make them practitioners subject to Circular 230, their tax preparation conduct is subject to the rules set forth in section 10.22 and other relevant provisions of Circular 230.

Under the facts of this Example 1, because H has not performed any services that may be performed only by a Circular 230 practitioner, H is not a practitioner subject to Circular 230. Accordingly OPR cannot impose discipline pursuant to Circular 230 for H’s personal non-compliance. However, OPR will refer H to the appropriate Examination function.

2. Q is a Circular 230 Practitioner. Q has a practice which includes preparation of returns and representation before the Service for individuals. Q filed his 2004 and 2005 form 1040’s one year past the filing deadline and requested no extension. Q made all payments on all taxes due and is due a refund. Q responded promptly to OPR’s inquiry but offered no explanations for his lapses. Q has never been sanctioned by OPR before.

For late filed 1040 returns at the time of OPR contact, the suggested sanction range is 2-4 months. As there are no mitigating or aggravating factors, the suggested sanction falls in the middle at 3 months. Thus, for 2 late filed form 1040's the total suggested suspension is 6 months (3 months x 2 years late filing). Note – the evidentiary standard at hearing for suspensions of less than 6 months is “preponderance of the evidence.” For suspensions of 6 months or more, the standard is “clear and convincing evidence.” See Cir. 230 § 10.76.

3. X is a Circular 230 Practitioner. X has a practice which includes tax planning and representation before the Service for individuals and businesses. Although X received extensions for 2004, 2005, and 2006, X filed his form 1040's for those three years one year past the extension and has not filed his first two quarters of his 941's due in 2005. X did make payments on all taxes due and is due a refund. X responded promptly to the OPR inquiry and indicated that in early 2005 X's wife filed for divorce and they underwent a contentious custody dispute. X also submits substantiating medical documentation that in early 2006 he ruptured a disc in his back that required surgery and had a long recuperation. X has never been sanctioned by OPR.

X has offered mitigating personal and health circumstances for the late-filing of his 2004 and 2005 form 1040's and for the first two quarters of form 941's due in 2005. The range for a 1040 late-filed at time of OPR contact is 2-4 months. Due to the mitigating factor of personal and health circumstances, 2 months is the appropriate range for the late filings for 2004 and 2005 each. For the 2006 late filed form 1040, there are no mitigating or aggravating factors, so the suggested suspension falls in the middle range of 3 months. Thus, for the late filed form 1040's the suggested total sanction is 7 months (2 months x 2 years late filing with mitigating factors + 3 months x 1 year late filing with no mitigating or aggravating factors). For the two 941's the range of sanctions for non-filed 941's at time of OPR contact is 4-6 months for each violation. Due to the mitigating factor of personal circumstances, 4 months is the appropriate sanction. The suggested suspension for the non-filed 941's is 8 months (4 months x 2 quarters of non-filing with mitigating factors). The total recommended sanction is 15 months.

4. Z is a Circular 230 Practitioner. Z has a practice which includes preparation of individual tax returns and representation before the Service. Although Z received extensions for 2005, 2006, and 2007, she has failed to file her form 1040's for those three years and has not filed her first two quarters of her 941s due in 2006. Z did make payments on all taxes due and is due a refund. Z has never been sanctioned by OPR. Upon contact by OPR, Z becomes confrontational beyond the bounds of an appropriate defense and asserts that OPR has no authority over her. Z states that she was so busy with her booming business that she had no time to attend to her own tax matters. She states that she will get the filings done when she gets to them.

Z's booming business is not a mitigating factor for the non-filings. In fact, Z's conduct indicates that she fails to understand or recognize that her actions constituted a violation of Circular 230. As such it is an aggravating factor. The suggested range for non-filed 1040's at the time of contact is 4-6 months. The suggested sanction for Z's non-filed 1040's is 18 months (6 months x 3 years non-filing with aggravating factors). The suggested range for non-filed 941's is 4-6 months; accordingly, the suggested sanction for Z's non-filed 941's is 12 months (6 months x 2 quarters non-filing with aggravating factors). The total suggested sanction is 30 months suspension.

5. Y is a Circular 230 Practitioner. Y has a practice which includes preparation of individual and entity tax returns, tax planning and representation before the Service for individuals and businesses. Although Y received extensions for her 2005 and 2006 1040's, she filed 2005 in January 2007 and had not filed 2006 until OPR contacted her, whereupon she immediately filed. Y responded promptly to the OPR inquiry and indicated that in September 2006, while she was already on extension, a local river flooded her basement office. She has provided insurance documentation verifying the flood. She was unable to recreate her documents in time to meet the extension deadline but filed as soon as she could. Moreover, she has always paid her taxes timely and has never been the subject of an OPR investigation. Y does not address the circumstances behind the late filing of her 2006 form 1040.

Y has offered mitigating circumstances for the late filing of her 2005 return that is sufficient to allow OPR to go below the minimum suggested guideline of 2 months for a form 1040 late filed at time of OPR contact, and impose no suspension for that late filing. X has



not provided sufficient mitigating evidence for the late filed 2006 return. The range for a 1040 non-filed at time of contact is 4-6 months. The recommended sanction would be 4 months suspension as she filed promptly upon contact (4 months x one year non-filing with mitigating factors.)